FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:)
)
Implementation of Sections of) MM Docket No. 92-266
the Cable Television Consumer)
Protection and Competition)
Act of 1992)

Rate Regulation

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF E! ENTERTAINMENT TELEVISION, INC.

E! Entertainment Television, Inc. ("E!") hereby submits its comments on the Commission's Fifth Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding.

E! has participated in earlier phases of Commission rulemakings dealing with both the benchmark/ price cap and cost-of-service aspects of cable television rate regulation. Of paramount concern to us throughout these proceedings has been the impact of rate regulation on the ability of our network and other new and innovative programmers to obtain the financial support essential to their continued growth and development.

E! has been in existence in its current format since 1990 and reaches approximately 26,000,000 subscribers nationwide. Its growth in ratings attests to the high degree of viewer acceptance and popularity of the service.[1] Unfortunately, since enactment of the Cable Television Consumer Protection and Competition Act of 1992 (the "Act")

[1] During the past year E!'s overall ratings have more than doubled and its weekend ratings have more than tripled.

and the Commission's implementation of the Act's rate regulation provisions began, our continued expansion into the number of homes that are critical to financial stability and future growth has not fared as well as our success in the ratings. Indeed, launches of E! by new affiliates have reached a standstill.

At first the climate of uncertainty and, more recently, serious regulatory disincentives have made many of the cable systems that do not yet carry E! reluctant to add our service. We are encouraged by the Commission's apparent recognition that greater economic incentives for cable operators to add programming services are essential to the continued vitality of the programming market. Accordingly, we are submitting these comments in support of proposals that would provide the necessary incentives both to strengthen existing programming services and to encourage the creation of new services.

The Commission has been presented with a variety of proposals for such incentives. No doubt the comments submitted in this proceeding will result in even more suggestions and recommendations. We hope that in crafting these important "going-forward" provisions, the Commission will make every effort possible to establish a climate that not only encourages cable operators to add new programming but also permits these decisions to be based on the merits of the programming and consumer demand rather than exclusively on their impact on rate formulas and operator revenues.

Structure of Program Incentives

The current rules provide a mark-up on increased program costs based on a percentage of the amount of the increase. Unfortunately, this approach serves as a disincentive for operators to add lower cost services like E! or others that are offered at no cost. Clearly, with the economic consequences of the operator's choice of programming service differing so dramatically, cable operators are more likely to add only more expensive channels to obtain a higher return. Thus, a cable operator can no longer rationally decide on the basis of the merits of the programming.

The playing field easily can be leveled for various types of channels by: (i) increasing the residual rate component from the current from 1¢ to 25¢ (a flat, per-added channel rate increase) regardless of the programming added; or (ii) establishing a flat-fee as an alternative to a percentage mark-up. This will insure that networks are added to scarce available channels based upon consumer preference and the ability of consumer demand to absorb reasonable cost increases. We believe that one flat-fee is the simplest and most equitable way of achieving the desired "neutrality" and that graduated flat-fee incentives based on number of subscribers would needlessly complicate the process and create an unfair competitive advantage for certain services. Proponents of the graduated approach have presented no justification for favoring new low-cost networks over existing low cost networks that have made substantial investments to achieve their current level of distribution.

Structure of Program Offerings

Another issue of importance to E! in this proceeding is the flexibility allowed for marketing of single channel, a la carte offerings. Under current policies, cable operators are severely limited in their ability to create innovative program offerings consisting of separate channels or a la carte options.

We again are encouraged by the Commission's awareness that creative new choices can result only from allowing cable systems to experiment with single channel offerings and marketing incentives without the fear of otherwise unregulated channels being treated as regulated tiers. Nevertheless, the current strictures on cable operator flexibility adversely affect programmers by making it difficult to achieve higher system penetration levels. Today, advertiser supported cable networks like E! cannot survive on regulated tiered growth alone, as current tiers achieve penetration rates below 20%, typically closer to 10%. Such low penetration levels are not sufficient to justify advertiser support. If a la carte options cannot be marketed effectively, consumers also will lose the benefit of greater choice.

While we support sensible limitations on operators' ability to migrate existing services from regulated to unregulated tiers, we encourage the FCC to provide fair exceptions to the limitations. For example, to protect consumers from extravagant programming cost increases, the operator should have the right to move an expensive basic network to an a la carte environment if the network has raised its price to an unreasonable level. Having moved the high cost service to the unregulated tier, where consumers will make the decision as to whether they will subscribe to the service, the operator should be permitted to move a less expensive basic network to a regulated tier - with corresponding programming fee decreases passed through to subscribers.

In addition, a safe harbor for "insignificant" migration should be offered to afford systems the flexibility to creatively package and market a la carte options consisting primarily of newly added services, including price discounting. This would increase consumer choice by producing low cost, multi-channel packages, would give newer networks and opportunity to be tested in the marketplace, and would encourage greater penetration levels.

Conclusion

During the past eighteen months, program networks like E! have experienced a frustrating halt to growth. While viewer acceptance and ratings have increased, launches of E! by new affiliates have reached a standstill. The Commission is in a position to restore the vitality of the programming market by making a few adjustments to its "going forward" rules. Cable operators need to be free to add new programming based primarily on subscriber demand and willingness to pay, not based on regulation-required revenue decisions. Cable operators also need to be free to market their services in creative ways, whether in regulated tiers or as unregulated, a la carte offerings. We believe that the essential measure of freedom can be restored to the marketplace but reasonable rates still can be assured by adopting the suggestions we are supporting.

Respectfully submitted,

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